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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 139. (+ 140 inside)

THE CONTINENTAL INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

DAVID WRIGHT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 16, 1885.

SUPREME COURT OF THE UNITED STATES.

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a UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the circuit court of the United States of America for the southern district of Illinois, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court of the United States for the southern district of Illinois, before you, between David Wright, plaintiff, and The Continental Iusurance Company of New York, defendant, a manifest error hath happened, to the great damage of the said defendant, The Continental Insurance Company of New York, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have
b the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this seventh day of July, in the year of our Lord one thousand eight hundred and eighty five, and of our Independence the one hundred and tenth year.

{ The seal of the Circuit Court of the United States for the South'n Dist. Ill. }

J. A. JONES,
Clerk Circuit Court U. S., South. Dist. Ills.

Filed July 7, 1885. J. A. Jones, clerk.

1 Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, on Monday, the second day of February, at the January term of said court, in the year of our Lord one thousand eight hundred and eighty-five, and of our Independence the one hundred and ninth year, before the Hon. Samuel H. Treat, district judge of said district, and in the absence of the Hon. Walter Q. Gresham, judge of the seventh judicial circuit, *pro tempore* sole judge of said circuit court.

J. A. JONES, *Clerk.*

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

DAVID WRIGHT
vs.
CONTINENTAL INSURANCE COMPANY OF NEW YORK.

Assumpsit.

Be it remembered that heretofore, to wit, on the twenty-seventh day of December, in the year of our Lord one thousand eight hundred and eighty-two, came The Continental Insurance Com-
2 pany of New York, defendant, by Messrs. Palmer and Phillips, its attorneys, and filed in the clerk's office of said circuit court of the United States a certified transcript from the circuit court of Greene county, Illinois, in a certain cause wherein David Wright, a citizen of the southern district of the State of Illinois, is plaintiff, and The Continental Insurance Company of New York, is defendant; which said certified transcript is in the words and figures following, to wit:

Certified Transcript from the Circuit Court of Greene County, Ills.

UNITED STATES OF AMERICA, }
State of Illinois, Greene County, } *ss:*

In Circuit Court. September Term, A. D. 1882.

Pleas before the Honorable Cyrus Epler, one of the judges of the 7th judicial circuit of the State of Illinois and sole presiding judge of the circuit court of Greene county, in the State aforesaid, and at a term thereof begun and held at the court-house, in the city of Carrollton, in said county, on the first Monday, being the fourth day, of September, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the
3 said United States the one hundred and seventh.

Present: Honorable Cyrus Epler, judge of the 7th judicial circuit of the State of Illinois; T. J. Albert, clerk; David F. King, State's attorney; Geo. W. Witt, sheriff.

Attest: T. J. ALBERT, *Clerk.*

4 *Copy of Precipe for Summons..*

STATE OF ILLINOIS, }
Greene County, } *ss:*

In the Circuit Court. To September Term, 1882.

DAVID WRIGHT
v.
THE CONTINENTAL INSURANCE COMPANY OF NEW YORK.

Assumpsit. $5,000.

To Thomas J. Albert, clerk of the circuit court:

Please issue summons in the above cause for the above demand,

returnable to the September term, 1882, directed to the sheriff of Greene county to serve it.

CHARLES D. HODGES AND
JAMES R. WARD,
Attorneys for Plaintiff.

Copy of Summons and Return Thereon.

STATE OF ILLINOIS, } ss:
Greene County, }

The people of the State of Illinois to the sheriff of said county, Greeting:

We command you that you summon The Continental Insurance Company of New York, if they shall be found in your county, to appear before the judge of the circuit court on the first day of the next term, to be holden at the court-house in Carrollton, within and for the county of Greene, on the first Monday of September next, to answer unto David Wright in plea of assumpsit in the sum of fifteen thousand dollars ($15,000); and of this writ make legal service and due return at the time and place aforesaid.

Witness Thomas J. Albert, clerk of our said court, at Carrollton, this 28th day of July, in the year of our Lord one thousand eight hundred and eighty-two, the seal of said court being hereunto affixed.

[L. S.] T. J. ALBERT, *Clerk.*

STATE OF ILLINOIS, } ss:
Greene County, }

5 I return the within writ duly served upon the within-named defendant company by leaving a true copy thereof with Messrs. Barnett & Corrington, agents of said company, residing in said Greene county, the president, clerk, secretary, superintendent, general agent, cashier, principal director of said defendant company not found in my county. This 31st day of July, 1882.

GEO. W. WITT, *Sheriff,*
By JOHN G. F. POWELL, *Deputy.*

Copy of Declaration.

STATE OF ILLINOIS, } ss:
Greene County, }

In the Circuit Court. September Term, 1882.

DAVID WRIGHT
vs.
THE CONTINENTAL INSURANCE CO. OF THE CITY OF NEW YORK.

Assumpsit.

David Wright, who is a citizen and resident of said Greene county, complains, by Charles D. Hodges and James R. Ward, his attorneys,

of The Continental Insurance Company of the City of New York, defendant, of a plea of assumpsit.

For that whereas the defendant, on, to wit, the 11th day of
6 July, 1881, in the city of Las Vegas, in the Territory of New Mexico, to wit, at the city of New York, in the State of New York, made and delivered its policy of insurance to the plaintiff, and thereby then and there, in consideration of the sum of one hundred and fifty dollars, paid by the plaintiff to the defendant, did then and there insure the plaintiff against and from loss or damage by fire to the amount of five thousand dollars, and certain property of the plaintiff, to wit, on his two-story adobe and wood-stuccoed shingle-roof hotel building, to be occupied for hotel purposes, and situated on block 144, bounded by Burnette, Sixth, Hudson, and Seventh streets, Silver City, Grant county, New Mexico; and the defendant, for the consideration aforesaid, in and by the said policy, promise- and acknowledge- and agree- to make good and satisfy the plaintiff all such immediate damage or loss as may be sustained by him, not exceeding his interest in the premises, to the amount of five thousand dollars, which may accrue by fire to the said property from and between the 11th day of July, 1881, at 12 o'clock
7 m., and the 11th day of July, 1882, at 12 o'clock m., such loss or damage to be estimated according to the actual cash value of the property at the time of the fire, and which amount of loss or damage the defendant then and there agreed, undertook, and promised the plaintiff to pay him within sixty days after the proofs of the same required by the company shall have been made by the plaintiff and received at the office of the *plaintiff* in the city of New York, and the loss shall have been ascertained and proved in accordance with the tenor and provisions of this said policy, unless the property be replaced by the company or notice has been given of its intention to rebuild or repair the damaged premises; which said policy and conditions, terms and provisions, are in the words and figures following, to wit:

No. 98. $5,000.00.

Cash capital, $1,000,000.00.

Continental Insurance Company of the City of New York,

In consideration of one hundred and fifty dollars, do insure David Wright against loss or damage by fire, to the amount of five
8 thousand dollars, on his two-story adobe and wood-stuccoed shingle-roof hotel building, to be occupied for hotel purposes, and situated on block 144, bounded by Bennett, Sixth, Hudson, and Seventh streets, Silver City, Grant county, New Mexico, special reference being made to his application, No. 98, which is his warranty, and a part hereof, $2,500.00, other concurrent insurance in the Fire Association of Philadelphia, Pa. In case of loss the assured agrees to pay one-half the actual expenses of our adjuster from the home office to Silver City, Grant county, New Mexico.

Amount insurance, $5,000.00; rate, 3%; term, one year; premium, $150.00.

And said Continental Insurance Company hereby agrees to make good unto the said assured, his executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum or sums insured, as above specified, nor the interest of the assured in the property, except as herein provided, as shall happen by fire to the property so specified, from the eleventh day of July, one thousand eight hundred and eighty-one, at twelve o'clock at noon, to the eleventh day of July, one thousand eight hun-
9 dred and eighty-two, at 12 o'clock at noon, the amount of the loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid in sixty days after the proofs of the same required by the company shall have been made by the assured and received at this office and the loss shall have been ascertained and proved in accordance with the terms and provisions of this policy, unless the property be replaced by the company or notice has been given of its intentions to rebuild or repair the damaged premises.

1. The application, survey, plan, or description of the property herein insured referred to in this policy shall be considered a part of this contract and a warranty by the assured during the time this policy is kept in force. Any false representation by the assured of the conditions, situation, or occupancy of the property, or any omission to make known every fact material to the risk, or an overvaluation, or any misrepresentation whatever, either in a written application or otherwise; or if the assured shall have or shall hereafter make any other contract of insurance, whether or not on
10 the property hereby insured or any part thereof, without the consent of this company written hereon; or of the abovementioned building shall at any time be occupied or used so as to increase the risk, or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever within the control of the assured; or if the building become unoccupied without the assent of this company endorsed thereon; or if it be a manufacturing establishment, running in whole or in part over or extra time or running at night; or if it shall cease to be operated without special agreement endorsed on this policy; or if the property be sold or transferred, or upon the passing or entry of a decree of foreclosure or upon a sale under a deed of trust; or if the property insured be assigned under any bankrupt or insolvent law or any change takes place in title or possession (except in case of succession of the death of the assured) for a period not exceeding twelve months thereafter, whether by legal process or judicial decree or voluntary transfer or conveyance; or if this policy shall be assigned before a loss without the consent of this company endorsed hereon;
11 or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in this policy; or if in said premises there be kept gunpowder, fire-works, nitro-glycerine, phosphorous, saltpetre, nitrate of sodas, petroleum, nap-tha, gasoline, benzine, benzole, or benzine varnish, or there be kept or used therein camphene, spirit gas, or any burning fluid or any chemical oils, without written

permission in this policy, then and in every such case this policy shall become void.

2. This insurance does not apply to or cover jewels, plate, watches, scientific or musical instruments, piano-fortes in dwellings excepted, ornaments, medals, patterns, printed music, printed books, engravings, paintings, picture-frames, sculpture, casts, models, or curiosities, unless particularly specified in this policy, and in no case exceeding the cost thereof, unless by special agreement.

This company shall not be liable by virtue of this policy or any renewal thereof until the premiums therefor be actually paid,
12 nor for loss by theft at or after a fire; nor for money or bullion, bills, notes, accounts, deeds, evidences of debt, or securities of property of any kind; nor for any loss or damage by fire caused by means of an invasion, insurrection, riot, civil commotion, usurped power, or of any military act or order; nor for any loss in or on buildings, unless the chimneys thereof are of stone or brick.

3. Nor in consequence of any neglect or deviation from the laws or regulations of police, where such exist; nor for any loss caused by the explosion of gunpowder, camphene, or any explosive substance; nor by lightning or explosions of any kind, unless fire ensues, and then for the loss or damage by fire only, which loss shall be determined by the value of the damaged property after the casualty by explosion or lightning; nor for loss or damage caused by removal of property, unless it be proved that such removal was necessary to preserve the property, in which case the damage shall be borne by the assured and the company in proportion as the sum hereby insured bears to the whole value of the property insured.

13 If a building shall fall, except as the result of a fire, all insurance by this company on it or its contents shall immediately cease and determine. If the interest of the assured in the property be other than an entire, unconditional, and sole ownership for the use and benefit of assured, or if the building insured stands on leased grounds, it must be so represented to the company and so expressed in the written part of this policy, otherwise the policy shall be void.

When property has been sold and delivered or is otherwise disposed of, so that all interest or liability for loss thereon, by fire or otherwise, on the part of the assured herein named has ceased this insurance on such property shall immediately terminate. Goods held on storage are not insured by this policy unless specifically agreed to in writing hereon.

4. If during this insurance the above-mentioned premises shall be used for any trade, business, or vocation, or for storing, using, or vending therein any of the articles, goods, or merchandise denominated hazardous or — hazardous or specially hazardous, in the class of hazards printed on the back of this policy (excepting such
14 as have a star prefixed); or if the occupation of such premises be changed from one of the class denominated extra hazardous, specially hazardous, to that of another of the same class, except as herein specially agreed to in writing upon this policy,

then and from thenceforth, so long as the same shall be so appropriated, applied, or used, this policy shall cease and be of no force or effect.

5. This insurance (the risk not being changed) may be continued for such further time as shall be agreed on, provided a renewal receipt, signed by the officers of the company and countersigned by its duly authorized and commissioned agent for the place hereinafter named, is given for the same, and the premium therefor is paid, and it shall be considered as continued under the original amounts and divisions unless otherwise specified in writing hereon; but in case there shall have been any change in the risk, either within itself or by the erection or occupation of neighboring buildings, not made known to the company by the assured at the time of renewal, the policy and renewal shall be void.

6. This insurance may be terminated at any time at the request of the assured, in which case the company shall retain only the customary short rates for the time the policy has been in force. This insurance may also be terminated at any time, at the option of the company, on giving notice to that effect and refunding or tendering a ratable proportion of the premium for the unexpired term of this policy to any person named in this policy, whether as owner, mortgagee, or otherwise; and it is a part of this contract that any person other than the assured or the duly authorized and commissioned agent of this company, who may have procured this insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy and not of this company under any circumstances whatever or in any transaction relating to this insurance.

7. The use of general terms or anything less than a distinct, specific agreement, clearly expressed and endorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction herein.

8. It is further understood and made part of this contract that the agent of this company has no authority to waive, modify, or strike from this policy any of its printed conditions, nor is his knowledge of or assent to insurance in other companies, or an increase of the risk, even if written within the limit of his authority herein expressed, binding upon the company until the same is endorsed in writing on the policy and the increased, if any, therefor; nor in case this policy shall become void by reason of the violation of any of the conditions thereof has the agent power to revive the same; nor shall a new policy, intended to replace any policy so made void, be of binding effect until the actual issue and delivery thereof to the assured, any contract by parole, or by understanding with the agent, to the contrary notwithstanding.

9. Persons sustaining loss or damage by fire shall forthwith give written notice of said loss to the company, and as soon after as possible render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portions of all policies thereon, also the actual cash value of the property and

their interest therein, for what purpose and by whom the building insured or containing the property insured and the several parts thereof were used at the time of the loss, when and how the
17 fire originated, and shall also produce a certificate, under the hand and seal of a magistrate or notary public (nearest the place of the fire, not concerned in the loss as a creditor or otherwise nor related to the assured), stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount which such magistrate or notary public shall certify. The assured shall, if required, submit to an examination or examinations under oath by any person appointed by the company and subscribe thereto when the same is reduced to writing, and shall also produce their books of account, bills, invoices, and other vouchers, and exhibit the same for examination at the office of the company, and permit extracts and copies thereof to be made; the assured shall also produce certified copies of all bills and invoices the originals of which have been lost, and shall exhibit all that remains of the property which was covered by this policy, damaged or not damaged, for examination to any person or persons named by the company, and as a part of the preliminary proofs of loss the assured shall, if the claim be for building destroyed by fire, procure the duly verified
18 certificate of some reliable and responsible builder as to the actual cash value of it immediately before said fire, and, if requested to do so, shall furnish the company with correct plans and specifications of the buildings destroyed or *except* copies thereof, which shall be duly verified by the oath of the assured, which shall be attached to and form a part of such proofs.

When personal property is damaged the assured shall forthwith cause it to be put in order, assorting and arranging the various articles according to their kind, separating the damaged from the undamaged, and shall cause an inventory to be made and furnished to the company of the whole, naming the quantity, quality, and cost of each article. The amount of sound value and of damage shall be determined by mutual agreement of the assured and the company; or, failing to thus agree, the same shall then be determined by appraisal of each article by competent persons (not interested in the loss as creditors or otherwise nor related to the assured or sufferers) to be mutually appointed by the assured and the company; their report, in writing, to be made under oath before any magistrate or other properly commissioned person, one-half of the appraisers' fees to be paid by the assured.

19 The company reserves the right to take the whole or any part of the articles at their appraised value, and, until such proof, declaration, certificates, plans, and specifications are produced and examinations and appraisals are permitted by the claimant, the loss shall not be payable. The best endeavors of the assured shall be used to save and protect the property from damage at and after the fire, and in case of failure so to do this company will not be liable for damage caused by such failure, nor can there be any

abandonment to the company of the property insured under any circumstances whatever.

In case of loss on property held in trust or on commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth in the proofs of loss, together with their respective interests therein.

Proof of loss must in each case be made by the owner of the property at the time of the fire, whether the loss be payable to a third party or the policy be held as collateral security or otherwise.

All fraud or attempt at fraud by false swearing or otherwise shall forfeit all claim on this company and be a perpetual bar to any recovery under this policy.

In case differences shall arise touching any loss or damage to any property insured by this policy, the question as to the amount of such loss or damage shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage only, but shall not affect nor waive any condition of this policy. It shall be optional with the company to repair, rebuild, or replace any property lost or damaged with other of like kind and quality, within a reasonable time, giving notice of its intention so to do within sixty days after receipt of proofs herein required.

The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, of repairing or replacing the same; and in case of the depreciation of such property, from use or otherwise, a suitable deduction from the cash cost of replacing the same shall be made to ascertain the actual cash value.

10. In case of any other insurance on the property hereby insured, whether valid or not, or made prior or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon; and it is hereby declared and agreed that in case the assured holding any other policy in this or any other company on the property insured subject to conditions of average, this policy shall be subject to average in like manner. Any insurance (floating or otherwise), all attaching, in whole or in part, to the property covered by this policy, shall, as between the assured and this company, be considered as contributing insurance for the full amount thereof and liable as such to pay *pro rata* any loss, total or partial, on the property hereby insured.

In case of a claim under a policy of reinsurance the liability of this company under this policy shall be in the proportion that the sum reinsured shall bear to the whole sum covered by the reinsured company.

11. It is furthermore hereby covenanted and agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an appraisal or arbitration and an award shall

have been obtained fixing the amount of such claim in the manner hereinbefore provided, nor shall any suit or action be
22 commenced unless within twelve months after the loss shall have accrued, provided however, that the time consumed after the selection of appraisers or arbitrators in the appraisal or arbitration of any claim under this policy shall not be accounted a part of such twelve months; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding.

This policy is issued and accepted under the provisions and conditions of chapter 189 of the Laws of the State of New York passed April 16, 1874, entitled "An act to provide security against extraordinary conflagrations and for the creation of safety funds by fire insurance companies." Under the provisions of this act the stockholders of the company can receive but seven per cent. per annum upon its capital and net earned fund until such earnings are at least equal in amount to the capital, and are set apart for the greater protection of policy-holders. Such earnings, as they accrue,
23 are to be equally divided into two funds, called the guaranty surplus fund and the special reserve fund. The amount of the capital and of the guaranty surplus fund are hereby made available without delay for the payment of claims then existing or caused by any great conflagration, while the special reserve fund is not liable for such claims, but is held under the provisions of the act by the New York insurance department and is devoted to the protection of policy-holders not involved in such conflagrations for the payment of later losses sustained by them, and to be a basis for the formation of new capital should the extent of the losses and other claims be such as to require such action.

This policy does not entitle the holder thereof to participate in the profits of the company's business.

And it is hereby mutually understood and agreed by and between this company and the assured that this policy is made and accepted upon and with reference to the foregoing terms, conditions, stipulations, and restrictions, and to the classes of hazards, memoranda, and conditions printed on the second page of this policy, all of which are hereby declared to be a part of this contract and
24 are to be used and resorted to in order to determine the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for in writing.

In witness whereof the Continental Insurance Company of the City of New York have caused these presents to be signed by their president and attested by their secretary, in the city of New York, but the same shall not be binding unless issued to cover property other than mills, manufactories, and other special hazards, nor until countersigned by the duly authorized and regularly commissioned agent of this company at Las Vegas, N. M.

GEO. T. HOPE, *President.*

Attest: CYRUS PECK, *Secretary.*

Countersigned at Las Vegas, New Mexico, this eleventh day of July, 1881.

T. B. MILLS, *Agent.*

No. 98.

Continental Insurance Company, Nos. 100 & 102 Broadway, New York. David Wright. Premises, building. Expires July 11th, 1882. Please read conditions of this policy. See each page. $5,000.00. Premium, $150.00. Policy, —. Survey, $150.00.

T. B. MILLS,
Agent, Las Vegas, New Mexico.

25 And the plaintiff avers that at the time of the making of this policy, and from thence until the happening of the loss and damage hereinafter mentioned, he was the sole, unconditional owner of and has an insurable interest in the property hereinbefore described greatly exceeding the amount of the said sum so by the defendant insured thereon as aforesaid.

And the plaintiff further avers that on the 19th day of January, 1882, the said property was consumed and destroyed by fire, whereby the plaintiff then and there sustained a loss and damage, to wit, on said property to the amount of fifteen thousand dollars.

And the plaintiff avers that the said loss and damage did not happen by means or in consequence of any invasion, insurrection, riot, or civil commotion, usurped power, or of any military act or order, nor by any neglect, deviation from any police regulations, nor from any explosion of gunpowder, camphene, or any other explosive substance, nor by the falling of said building, except as the result of said fire, nor from any neglect of the plaintiff.

26 Plaintiff further avers that forthwith after the loss and damage, on, to wit, the 19th day of January, 1882, he gave notice, in writing, thereof to the defendant, and as soon thereafter as possible, on, to wit, the 12th day of May, 1882, rendered and delivered to the defendant, at its office in the city of New York, a particular account of such loss, signed and sworn to by the plaintiff, together with a certificate, under the hand and seal of John S. Rilen, the magistrate nearest the fire, not concerned in the loss as a creditor or otherwise or related to the plaintiff, stating that he had examined the circumstances attending the loss and knows the character and circumstances of the plaintiff, and that he verily believes that the plaintiff has, without fraud, sustained loss on the property insured to the amount of $1,200.

Plaintiff further avers that the property has not been replaced by the defendant nor has the defendant given to the plaintiff any notice of its intention to rebuild or repair the same.

And the plaintiff further avers that though he has kept and performed all things on his part to be kept and performed, and although

27 he has sustained loss and damage by fire on the said property in the manner and form aforesaid and to the amount aforesaid, to wit, fifteen thousand dollars, nevertheless the defendant, hough often requested, has not yet paid to the plaintiff the amount

of insurance in the said policy, to wit, the said fifteen thousand dollars, or any part thereof, but refuses so to do, to the damage of the plaintiff of fifteen thousand dollars, and therefore he sues.

And whereas, also, the defendant, on the 26th day of January, 1882, in the county aforesaid, was in debt to the plaintiff in the sum of fifteen thousand dollars for money before that time received by the defendant for the use of the plaintiff; and in the like sum for interest and divers sums of money before that time foreborne by the plaintiff to the defendant, at its request, for divers spaces of times before then elapsed; and in the like sum for money found to be due from the defendant to the plaintiff on account then and there to be between them; and, being so indebted, the defendant, in consideration thereof, then and there promised the plaintiff to pay him, on request, several sum- of money so due to him as aforesaid, yet, although *to* day of payment of the several sums of money
28 above specified *was* long since elapsed, *yet* the defendant *was* not *not* paid the same or any or either of them or any part thereof, as well as the said sum of money above specified, agreed to be paid on account of said loss and damage, but refuses so to do, to the damage of the plaintiff of fifteen thousand dollars; and therefore he brings suit, &c.

CHARLES D. HODGES & JAMES R. WARD,
His Attorneys.

The Continental Insurance Company of New York City Dr. to David Wright.

For interest	$15,000
For money had and received	15,000
On account stated	15,000

DAVID WRIGHT.

Copy of Petition for Removal of Cause to the U. S. Circuit Court of Southern Dist. of Ill.

In the Circuit Court of Greene County, State of Illinois.

DAVID WRIGHT, Plaintiff,

vs.

THE CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK, Defendant.

Petition for removal to the circuit court of the United States, southern district of Illinois.

To said circuit court:

29 Your petitioner, The Continental Insurance Company of the City of New York, respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled cause and suit exceeds, exclusive of costs, the sum or value of five hundred dollars; that the controversy in said suit is between citi-

zens of different States, and that the petitioner was, at the time of the commencement of this suit, and still is, a citizen of the State of New York, and the plaintiff, David Wright, was then and still is a citizen of the State of Illinois; that the subject-matter and controversy in said suit is not upon a claim or cause of action arising out of any business or transaction in fact done in this State, but is upon a claim or cause of action arising out of business and transactions in fact done in the Territory of New Mexico.

And your petitioner offers herewith a bond, with good and sufficient surety, for petitioner's entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was
30 wrongfully or improperly removed thereto. And petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for southern district of Illinois. And your petitioner will ever pray.

THE CONTINENTAL INSURANCE COMPANY
OF THE CITY OF NEW YORK,
By PHILLIPS & STEWART, *Its Attorneys.*

STATE OF ILLINOIS, }
Greene County, } *ss:*

I, J. W. Phillips, being duly sworn, do say that I am a member of the firm of Phillips & Stewart, the attorneys for the petitioner in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true as I verily believe.

J. W. PHILLIPS.

Subscribed by the said J. W. Phillips in my presence and by him sworn to before me this the 13th day of September, 1882.

T. J. ALBERT,
Cir. Clerk.

31 *Copy of Transcript of Proceedings in Circuit Court, Greene Co., Ill., Sept. Term,* 1882, *as Taken from Court Record.*

Among other proceedings the following appears, under date of Sept. 6th, 1882, and is entered of record, to wit:

DAVID WRIGHT *vs.* CONTINENTAL INSURANCE CO.

Assumpsit.

And now comes the plaintiff and moves for leave to amend summons.

On consideration, motion sustained and leave granted.

On September 21st, 1882, the following was had and entered of record, to wit:

In the Greene County Circuit Court. September Term, 1882.

DAVID WRIGHT

vs.

CONTINENTAL INSURANCE CO. OF THE CITY OF NEW YORK, Defendant.

Now, at this day, comes The Continental Insurance Company of the City of New York, the defendant in the above-entitled cause, by Phillips & Stewart, its attorneys, and enters its appearance herein, and at the time of so doing files herein its petition for
32 the removal of said cause from this court to the circuit court of the United States for the southern district of Illinois, and also files with said petition the bond, with surety required by the laws of the United States in such cases made and provided; and said bond and surety being approved and accepted by this court, it is ordered by this court that said cause be no further proceeded with in this court, but that the prayer of said petition be granted; and it is further ordered that the clerk of this court forthwith certify to the circuit court of the United States for the southern district of Illinois a full, true, and complete transcript of the record and proceedings in this cause as fully as the same remains of record in this court.

Copy of Power of Attorney Authorizing J. W. Phillips to Represent and Act for Continental Ins. Company as its Agent.

Know all men by these presents that The Continental Insurance Company of the City of New York has constituted and appointed,
33 and does by these presents constitute and appoint, J. W. Phillips, of St. Louis, Missouri, its agent and attorney, with power and authority to sign the name of said company to any bond or bonds that may be required to be executed in order to remove the suit or cause of action now pending in the circuit court of Greene county, State of Illinois, in which David Wright is plaintiff and The Continental Insurance Company of the City of New York is defendant, from said circuit court to the circuit court of the United States for the southern district of Illinois. The said Continental Insurance Company of the City of New York hereby ratifies and confirms all that the said J. W. Phillips has done in respect to said removal, and especially adopts, ratifies, and confirms the signing by him of the name of this company to a bond for the removal of said cause, in the penal sum of five hundred dollars, and dated and signed on the 13th day of September, A. D. 1882, on which Stephen F. Corrington and J. W. Phillips are sureties, and which bond is now on file in said circuit court of Greene county, Ill., with the petition for the removal of said cause; and the said company hereby acknowledges itself as fully bound by the said bond as though the same were signed by its president and its corporate seal attached.

34 In witness whereof the said Continental Insurance Company of the City of New York has caused these presents to

be duly signed and the corporate seal attached this 16th day of September, 1882.

[SEAL.] CONTINENTAL INS. COMP.,
By H. H. LAWPORT, *V. Pres't.*

Attest: CYRUS PECK.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

On this 16th day of September, A. D. 1882, before me personally came H. H. Lawport, vice-president of the Continental Insurance Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the city of Brooklyn, county of Kings and State of New York; that he was the vice-president of the Continental Insurance Company of the City of New York; that he knew the corporate seal of said company; that the seal affixed to the foregoing instrument was such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed his name thereto by like order as vice-president of said company.

[SEAL.] CHARLES P. SANFORD,
Notary Public, New York County.

35 *Copy of Bond.*

Know all men by these presents that the Continental Insurance Company of the City of New York, as principal, and Stephen F. Corrington and J. W. Phillips, as sureties, are held and firmly bound unto David Wright in the penal sum of five hundred dollars ($500), the payment whereof, well and truly to be made unto the said David Wright, his heirs and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly, upon these conditions: The said Continental Insurance Co. of the City of New York having petitioned the circuit court of Greene county, State of Illinois, for the removal of a certain cause therein pending, wherein David Wright is plaintiff and the Continental Insurance Co. of New York is defendant, to the circuit court of the United States in and for the southern district of Illinois, now, if the Continental Insurance Company of New York, your petitioner, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by the said circuit court of the United States if said court shall hold that said
36 suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and effect.

Witness our hands and seals this 13th day of September, 1882.

THE CONTINENTAL INSURANCE COMPANY
OF THE CITY OF NEW YORK,
By J. W. PHILLIPS, *Att'y.* [SEAL.]
STEPHEN F. CORRINGTON. [SEAL.]
J. W. PHILLIPS. [SEAL.]

STATE OF ILLINOIS, } ss:
Greene County, }

I, —— ——, of the said county, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Illinois and a property-holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution; that I have property in the State of Illinois liable to execution of the value of more than five hundred dollars.

—— ——.

Subscribed in my presence by —— —— and by him sworn to before me this — day of September, A. D. 1882.

—— ——.

37 STATE OF ILLINOIS, } ss:
Greene County. }

I, Thomas J. Albert, clerk of the circuit court of Greene county, in the State aforesaid, and keeper of the records and files of said court, do hereby certify the above and foregoing to be a true, perfect, and complete copy of the record and proceedings in a certain cause there pending in said court, on the law side thereof, wherein David Wright was plaintiff and The Continental Fire Insurance Company defendants, as the same appear from the records and files of said court now in my office remaining; and, further, the fees paid by J. W. Phillips, six dollars.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Carrollton, this 22d day of November, A. D. 1882.

[L. S.] THOMAS J. ALBERT, *Clerk.*

Indorsed: Filed December 27, 1882. J. A. Jones, clerk.

38 And afterwards, to wit, on Wednesday, the ninth day of January, at the January term of said court, in the year of our Lord one thousand eight hundred and eighty-four, the following proceedings were had in said court in said cause and entered of record, to wit:

DAVID WRIGHT *vs.* CONTINENTAL FIRE INSURANCE COMPANY.

Assumpsit.

On motion of plaintiff, by J. R. Ward, Esq., his attorney, the defendant is ruled to plead herein by to-morrow morning.

And afterwards, to wit, on Friday, the 30th day of January, in the year of our Lord one thousand eight hundred and eighty-five, came the defendant, by Palmer & Phillips, its attorneys, and filed in the clerk's office of said court its plea; which said plea is in the words and figures following, to wit:

WRIGHT *vs.* THE CONTINENTAL INS. CO.

39 And the defendant, by its attorneys, comes and defends the wrong and injury, when, &c., and says it did not promise and undertake in manner and form as the plaintiff has above thereof complained against him, & of this he puts himself upon the country.

PALMER & PHILLIPS, *For Def't.*

And the plaintiff doth likewise.

BISBEE & WARD,
Attorneys for Plaintiff.

Indorsed: Filed Jan'y 30, 1885. J. A. Jones, cl'k.

And afterwards, to wit, on the day and year last aforesaid, at the January term of said court, the following proceedings were had in said court in said cause and entered of record, to wit:

DAVID WRIGHT *vs.* CONTINENTAL FIRE INSURANCE COMPANY.

Assumpsit.

This day comes as well the plaintiff, by Messrs. L. H. Bisbee and J. R. Ward, his attorneys, as the defendant, by Messrs. Phil-
40 lips & Stewart and John M. Palmer, Esq., its attorneys; and, issue being joined, whereupon comes a jury of good and lawful men, to wit, P. H. Pentzer, James A. Drennan, William Carson, I. B. Betts, William J. Downs, Michael H. Beaver, William H. Cotter, John F. Black, James Altig, John H. Gregory, Thomas Knox, and Alexander Moore, duly elected, tried, and sworn to try said issue, and, having heard the evidence in part, the further trial of this cause is postponed until to-morrow morning.

And afterwards, to wit, on Saturday, the 31st day of January, in the term and year last aforesaid, the following proceedings were had in said court in said cause and entered of record, to wit:

DAVID WRIGHT *vs.* CONTINENTAL FIRE INSURANCE COMPANY.

Assumpsit.

This day come again the parties, by their attorneys, and also the jury impanneled and sworn herein, and, after hearing additional evidence, the further trial of this cause is postponed until Monday morning next.

41 And afterwards, to wit, on Monday, the second day of February, in the term and year last aforesaid, the following proceedings were had in said court in said cause and entered of record, to wit:

DAVID WRIGHT *vs.* CONTINENTAL FIRE INSURANCE COMPANY.

Assumpsit.

This day come again the parties, by their attorneys, and also the jury impanneled and sworn herein, who, after hearing the remainder of the evidence, argument of counsel, and receiving the instructions of the court, for verdict say: "We, the jury, find the issue for the plaintiff, and assess his damages to the sum of five thousand seven hundred and fifty dollars."

It is therefore ordered and adjudged by the court that the plaintiff recover of the defendant the said sum of five thousand seven hundred and fifty dollars, his damages aforesaid assessed by the jury, together with the sum of — dollars and — cents, his costs and charges by him about his suit in this behalf expended, and that execution issue therefor.

42 And afterwards, to wit, on Saturday, the ninth day of May, in the term and year last aforesaid, the following proceedings were had in said court in said cause and entered of record, to wit:

DAVID WRIGHT *vs.* CONTINENTAL FIRE INSURANCE COMPANY.

Assumpsit.

And now, on this 9th day of May, 1885, come again the parties, by their counsel, and submit to the court the defendant's motion for a new trial, and the court having heard and considered their allegations and proofs, and being sufficiently advised in the premises, doth order and adjudge that the motion be overruled, and leave is given to the defendant to tender a bill of exceptions within sixty days from this date.

And afterwards, to wit, on Tuesday, the seventh day of July, in the year last aforesaid, comes the defendant and files in the clerk's office of said court its bond to David Wright, plaintiff; which said bond is in the words and figures following, to wit:

43 Know all men by these presents that we, The Continental Insurance Company of the city, county, and State of New York, and Charles Ridgley, of the county of Sangamon and State of Illinois, are held and firmly bound unto David Wright in the full and just sum of eleven thousand five hundred dollars, to be paid to the said David Wright, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, and successors, jointly and severally, by these presents.

Sealed with our seals and dated this second day of July, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas lately, at the January term, 1885, of the circuit court of the United States for the southern district of Illinois, in a suit depending in said court between David Wright, plaintiff, and The Con-

tinental Insurance Company of New York, defendant, judgment was rendered against the said Continental Insurance Company for the sum of five thousand seven hundred and fifty dollars and costs
44 of suit, and the said Continental Insurance Company having obtained writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said David Wright, citing and admonishing him to be and appear at a supreme court of the United States to be holden at Washington the second Monday of ——:

Now, the condition of the above obligation is such that if the said Continental Insurance Company shall prosecute said writ of error to effect and answer all damages and costs if it shall fail to make good its said plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

H. H. LAMPORT, *V. Pres't.* [SEAL.]
CHARLES RIDGLEY. [L. S.]

Attest: CYRUS PECK, *Secretary.*

Approved by—
S. H. TREAT, *Dist. Judge.*

July 7, 1885.

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

45 Be it remembered that on this second day of July, A. D. 1885, before me personally appeared H. H. Lamport, to me personally known and known to me to be the vice-president of the Continental Insurance Company, the corporation described in and which executed the foregoing instrument, and the said H. H. Lamport, being duly sworn, did depose and say that he resides at Brooklyn, Long Island, New York, and is the vice-president of the Continental Insurance Co. aforesaid; that he knows the corporate seal of said company; that the seal affixed to the foregoing bond is such corporate seal; that he caused the said bond to be sealed with such corporate seal and attested by the secretary of said company by authority of the board of directors of said company, and that he signed his name thereto as vice-president by like authority.

[L. S.] JAMES W. DURBROW,
Notary Public, King's County.

C't'f't- filed in N. Y. Co.

STATE OF NEW YORK, } ss:
City and County of New York, }

46 I, Patrick Keenan, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that Jas. W. Durbrow has filed in the clerk's office of the county

of New York a certified copy of his appointment as notary public for the county of Kings, with his autograph signature, and was, at the time of taking the proof or acknowledgment of the annexed instrument, duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such notary and verily believe the signature to the said certificate of proof or acknowledgment to be genuine. I further certify that said instrument is executed and acknowledged according to the law of the State of New York.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county this 2d day of July, 1885.

PATRICK KEENAN, *Clerk.*

Indorsed: Filed July 7, 1885. J. A. Jones, clerk.

47 And afterwards, to wit, on Tuesday, the seventh day of July, in the year of our Lord one thousand eight hundred and eighty-five, comes the defendant, by its attorneys, and presents to the court its bill of exceptions in this cause, which is signed, sealed, and made a part of the record in this cause, and is in the words and figures following, to wit:

48 *Bill of Exceptions.*

DAVID WRIGHT
vs.
THE CONTINENTAL FIRE INSURANCE COMPANY.

Be it remembered that on the trial of this cause the following proceedings were had: It was stipulated and agreed between the plaintiff and defendant, before the jury was impanneled, that under the plea of the general issue plead in this cause defendant might introduce any other evidence which might be introduced under notice of special defenses. Thereupon, the jury beingi mpanneled, the plaintiff, to sustain the issue on his part, offered and proved the execution of the policy sued on and read the same in evidence to the jury, the material parts of which are as follows:

Copy of Policy.

In consideration of one hundred and fifty dollars the Continental Insurance Company of the City of New York do insure David
49 Wright against loss or damage by fire to the amount of five thousand dollars, on his two-story adobe and wood-stuccoed shingle-roof hotel building, to be occupied for hotel purposes, and situated on block 144, bounded by Bennett, Sixth, Hudson, and Seventh streets, Silver City, Grant county, New Mexico, special reference being made to his application, No. 98, which is his warranty, and a part hereof, $2,500, other concurrent insurance in the Fire Association of Philadelphia, Pa. In case of loss the assured agrees to pay one-half of the actual expense of our adjuster from the home office to Silver City, Grant county, New Mexico.

And said Continental Insurance Company hereby agrees to make good unto the said assured, his executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum or sums insured as above specified, nor the interest of the assured in the property, except as herein provided, as shall happen by fire to the property so specified, from the eleventh day of July, one thousand eight hundred and eighty-one, at 12 o'clock at noon,
50 to the eleventh day of July, one thousand eight hundred and eighty-two, at 12 o'clock at noon, the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid in sixty days after the proofs of the same required by the company shall have been made by the assured and received at this office, and the loss shall have been ascertained and proved in accordance with the terms and provisions of this policy, unless the property be replaced by the company or notice has been given of its intention to rebuild or repair the damaged premises.

The application, survey, plan, or description of the property herein insured referred to in this policy shall be considered a part of this contract and a warranty by the assured during the time this policy is kept in force. Any false representation by the assured of the condition, situation, or occupancy of the property, or any omission to make known every fact material to the risk, or any overvaluation, or any misrepresentation whatever, either in a written application or otherwise; or if the assured shall have or shall
51 hereafter make any other contract of insurance, whether valid or not, on the property hereby insured or any part thereof, without the consent of this company written hereon; or if the above-mentioned building shall at any time be occupied or used so as to increase the risk, or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever within the control of the assured; or if the building become unoccupied without the assent of this company endorsed hereon; or if it be a manufacturing establishment running in whole or in part over or extra time or running at night; or if it shall cease to be operated without special agreement endorsed on this policy; or if the property be sold or transferred; or upon the passing or entry of a decree of foreclosure, or upon a sale under a deed of trust; or if the property insured be assigned under any bankrupt or insolvent law, or any change takes place in title or possession, except in case of succession by reason of the death of the assured, for a period not exceeding twelve months thereafter, whether by legal process
52 or judicial decree or voluntary transfer or conveyance; or if this policy shall be assigned before a loss, without the consent of this company endorsed hereon; or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in this policy; or if in said premises there be kept gunpowder, fire-works, nitro-glycerine, phosphorus, saltpetre, nitrate of soda, petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish, or there be used or kept therein camphene, spirit gas, or any burning fluid or

any chemical oils, without written permission in this policy, then and in every such case this policy shall become void.

If the interest of the assured in the property be other than an entire, unconditional, and sole ownership, for the use and benefit of assured, or if the building insured stands on leased ground, it must be so represented to the company and so expressed in the written part of this policy, otherwise the policy shall be void. When property has been sold and delivered, or is otherwise disposed of,
53 so that all interest or liability for loss thereon, by fire or otherwise, on the part of the assured herein named has ceased, this insurance on such property shall immediately terminate. Goods held on storage are not insured by this policy unless specifically agreed to in writing hereon.

In case of loss on property held in trust or on commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth in the proofs of loss, together with their respective interests therein.

Proofs of loss must in each case be made by the owner of the property at the time of fire, whether the loss be payable to a third party or the policy held as collateral security or otherwise. All fraud or attempt at fraud, by false swearing or otherwise, shall forfeit all claim on this company and be a perpetual bar to any recovery under this policy.

In witness whereof the Continental Insurance Company of the City of New York have caused these presents to be signed by
54 their president and attested by their secretary, in the city of New York, but the same shall not be binding unless issued to cover property other than mills, manufactories, and other special hazards, nor until countersigned by the duly authorized and regularly commissioned agent of this company at Las Vegas, N. M.

GEO. T. HOPE, *President.*

Attested: CYRUS PEET, *Secretary.*

Countersigned at Las Vegas, New Mexico, this eleventh day of July, 1881.

T. B. MILLS, *Agent.*

55 And, further to sustain the issues on his part, plaintiff read the deposition of Joseph Lusigman, who testified in substance that he was twenty-three years old, resided in New Mexico; occupation, millwright and carpenter. He knew the plaintiff, who was generally known as one of the firm of Wright, Roodhouse, and Edwards, in Silver City, New Mexico, and knew the property that was burned as the Carrolton Hotel; that when that hotel was built he did the carpenter work and had charge of the plastering and putting in the pipes which were intended to heat the house, and that when the hotel was completed he slept in it and kept his tools and baggage there; that when he repaired Wagner's building, occupied by Samuel Exstein, in Silver City, he found two small cans of Du Pont powder and one large iron can of blasting powder about a quarter full. Exstein gave it to him, and he took it to the Carrol-

ton Hotel, where he had his carpenters' bench, on the ground floor, in the southwest room of the building, which he was then using as his carpenter shop while working on the hotel, and witness
56 used this room as his carpenter shop while he remained in Silver City; that no one knew of this powder being there but himself; that he had charge of the hotel himself after Wright went East, and Wright told him to keep an eye on things around there. Graham was then working a mine at Georgetown, but witness didn't know whether Graham had the general management of the hotel at that time or not. Witness carried the powder to the hotel on his own responsibility; and he further stated that this powder, when he came to examine it afterwards, had been wet, was caked and in lumps, and that parties who had intended to use it on a trip to Mexico refused to take it or to take their chances among the Indians with that kind of powder. The powder in the large can had also been wet. Witness threw out the two small cans and put the large can back in his chest, and then went to a sack he had in there, which contained giant powder and fuse caps. The giant powder was the same as he had taken from the Carrolton quartz mill. He had intended to use it in some mines he had in the country. He gave to the parties who went into Mexico all but four sticks
57 of the giant powder and part of the coil of fuse, and he gave them all the caps. The giant powder was only in his chest a few days before he gave it away to these parties. He had kept the same powder in a stone stable until he purchased a horse, but afterwards he removed the giant powder to his chest in the hotel. No one knew the giant powder was in there except himself and the party who went to Mexico. The other four sticks of giant powder and the remaining fuse he left on a window-sill in the room of the hotel adjoining the carpenter shop. At the time of the fire he had removed one tool-chest from the hotel, but his tent, pick, shovel, drills, and hammer and the balance of his baggage he left in the hotel, and also one tool-chest. Witness further stated that on the twelfth or thirteenth of December, 1881, he quit sleeping at the hotel; went there a few times afterwards to see about the tools and to get some if he needed them. He had the keys to two rooms and locked them from the inside. He left the keys in the key-holes. He wasn't at the hotel on the night of the fire and did not know of it till six o'clock the next morning.

58 On cross-examination he said he first went into the Carrolton Hotel building upon authority of David Wright, who told him he could go and sleep in there, and he went in there after it was completed, upon the consent of David Wright. He was in there before and up to the completion of the building. After the completion he occupied and used a portion of the building for doing his work as carpenter, by David Wright's consent, and remained there until he left, by Wright's consent. Witness supposed he took orders from Mr. Wright and Mr. Edwards alike with regard to the building after its completion.

On redirect examination he said he knew nothing about any transfer, and if there was any made he didn't know whether the

orders he referred to were given before or after the transfer. He said he believed Wright gave him the last order, to go and put in the plumbing, but he didn't know who the owner was.

Plaintiff also read the deposition of John J. Bell, who stated that his age was thirty-six; occupation, an attorney-at-law; residence, Silver City, New Mexico; that he and his partner were the
59 attorneys of Wright, and after the burning of the hotel notified defendant of the loss, when he was referred to J. T. Dargon, of Dallas, as the agent of the company, with whom he corresponded. Dagon came to Silver City in February, after the fire, and told him he was an adjuster for the defendant and also for the other company with which the building was insured, and he called for the ground plan and then for the plans and specifications of the building. The ground plan was furnished, and the plans and specifications being in the office of Meredith & Aleman, bankers, Dargon saw them there. The witness offered to get Dargon a copy, but Dargon said it was not necessary. Dargon afterwards wrote from Dallas that he was not an adjuster, and that he did not represent himself as such, and then witness proceeded to act according to the terms and requirements of the policy. The correspondence referred to is that attached to the deposition of his partner, J. M. Wright. When witness was introduced to Dargan, Dargan said he had lost his carpet-bag, containing valuable papers connected with this insurance matter, which he had left on the train, and he seemed
60 very much distressed about the loss of the papers. Dargan said he was an adjuster, but couldn't tell until after an investigation whether he would recommend the replacing of the building or settling the insurance. He would have to look around and see what could be done.

Plaintiff also read the deposition of John Graham, who testified that his age was forty-one; occupation, keeping a grocery store and livery stable, and residence, Silver City, New Mexico. He knew Wright and was in his employ; went to work for the company in 1881 and worked about twenty months, mining a portion of the time and serving as watchman in what was called the Carrolton Hotel, in Silver City. The same building was afterwards burned down. He had charge of the property and also of the house adjoining it on the north. At the time of the fire he was in bed in the house adjoining the hotel; had no knowledge as to the cause of the fire. About four o'clock on the morning of the fire a negro who slept in the hotel knocked at the door of witness and said the hotel is on fire. Witness got up, but, seeing no possibility of putting out the fire, he saved what doors and windows he could. He
61 knew nothing about any powder being in the building; wouldn't allow the men to keep a lamp in it even, but made them burn candles. Witness was at the hotel every night except the night of the fire; that night he was out a little late and went to bed with one Washington. A darkey by the name of Thornton and a Frenchman by the name of Lusigman, who plastered the hotel, were in charge of it by authority of witness. I never gave Lusigman or any one else permission to keep gunpowder or other com-

bustible material in or about the building, and never knew they were doing so. Plaintiff knew Thornton. He was not in plaintiff's employ at that time, but, he had been and was regarded as a good, faithful servant, and Thornton had privilege from witness to sleep in the hotel. Witness knew Dargan; had met him in Silver City and had sworn to an affidavit and given it to him. The affidavit was about who was in charge of the property when it burned, and as to how it was taken care of. At the request of Dargan witness had furnished plans and specifications, giving them to Robert Black. By instructions of Dargan witness also paid for them. Dargan told the witness he was agent of the companies, and Dargan was made
62 acquainted with witness by Mr. Wiggins, the deputy postmaster. Dargan said he came to get surveys of the property.

On cross-examination the witness said he entered the employ of the company on the seventh of January, '81, and remained in their employ until after the burning of the hotel. Witness gave Lusigman and Thornton the use of a room in the hotel in consideration of their having an eye on the property in his absence. Witness was shown a paper in the words and figures following, which he said he wrote, but claimed that he just scribbled it off in his own office:

I was watchman at the Carrolton Hotel. When it was insured Mr. Wright told me that I need not watch it any longer, that it was insured, and he did not care if it was burnt or not; that it was no good, and he hoped that some one would burn it, in order that he would get the insurance. S. E. offered J. S. three hundred dollars if he would burn it. J. S. said that he would not do it; that he must get some one else to do it. D. Wright did not own the property; it belonged to W. R. and Co. (Marked Exhibits to Graham's deposition.)

Witness said the Carrolton Hotel was not occupied as a
63 hotel at the time of the fire.

On re-examination witness said that the writing, Exhibit A, was not written for any purpose at all, but was only a piece of scribbling.

On recross-examination he stated that the initials S. E. and J. S. in Exhibit A stood for just those letters.

Plaintiff also read the deposition of William Chamberlain, who testified that his age was fifty, he resided in Silver City, and had known the plaintiff two years. He knew the Carrolton Hotel that was burned. Witness lived about three or four hundred feet from the building. He had been living at the same spot for about eight years. Witness was about the hotel nearly every day while it was being built, and thought the cost of construction was about thirteen thousand dollars. He regarded thirteen thousand dollars as the fair value of the building at the time it was burned. Witness thought there were two or three persons stopping at the building from the time the roof was put on until it burned, and that Graham was one of them; saw Graham there frequently; was there the night of the fire and saw Graham there.

On cross-examination witness said he had nothing to do with

building the new building, but helped to put up the old
64 adobe building in 1872.

R. B. Washington's deposition was also read by plaintiff, who testified that he was twenty-six years old and lived in Georgetown, N. M. Witness was at the fire; was visiting in Silver City at the time; knew Graham, and saw him on the night of the fire, both before and during the fire. Witness slept with him that night. Witness and Graham slept in the office of the Carrolton Company, a little north of the hotel building. About two o'clock witness was awakened by some one crying fire. The fire started on the second floor of the hotel and had burned through the ceiling of the first story when witness saw it. Some persons had already arrived, and Graham and the witness tried to save windows and doors and so forth. The room witness and Graham slept in was about eighty or eighty-five feet from the hotel, with a fence between, and was in the same block with the hotel. Witness thought that, on account of the scarcity of water and the condition of the fire when he discovered it, it could not have been put out.

On cross-examination he said that, to the best of his knowledge, the hotel building had not been occupied as a hotel up to the time of the fire. The building in which they slept had no con-
65 nection with the hotel, so far as witness knew.

The deposition of John M. Wright was then read by plaintiff. John M. Wright testified that he was thirty-two years old and an attorney-at-law, residing in Silver City, where he had lived two years. He was one of the law firm of Bell and Wright and, as such, had business with both the Continental and the Fire Association of Philadelphia. He knew the hotel property before it was burned, but knew nothing of the fire itself. Shortly after the fire his law firm received a letter from the plaintiff requesting them to attend to the adjustment of the insurance upon the hotel property, but nothing was done until Mr. Dargan arrived in Silver City, representing himself to be an agent of the Fire Association of Philadelphia and of the Continental Insurance Company of New York. Witness and his partner answered all questions put by Dargan and furnished him every facility in their power to ascertain all the facts concerning the fire and the character of the building burned. Witness went with Dargan to the house of Meredith and Aleman, where documents which purported to be plans and specifications of the building were submitted for Dargan's inspection. The recollection of witness was that no exact drawings and specifications of the building were in
66 existence. At Dargan's request witness employed an engineer, Mr. Swain, who he thought was to make drawings of a ground plan of the hotel according to the description given to him by the builders. Witness thought the name of the builder was Joseph Lusigman. Dargan requested these drawings to be delivered to Robert Black, contractor and builder, as soon as possible after his departure. Witness complied, but took no further action until March 14th, '82, when he wrote two letters—one to each of the insurance companies concerned in the loss in question.

The letter addressed to the Continental Insurance Company was

here read, and was to the effect that Bell and Wright, as attorneys for the plaintiff, had met Mr. Dargan at Silver City and had furnished him every facility in their power to prosecute his investigation, and they had given to Robert Black a ground plan of the building burned, and they inquired whether anything more was needed, offering to give any reasonable data that might be required. The letter stated that nearly two months had elapsed since the fire, and further action was still awaited. To this a response was received, which was read, to the effect, after acknowledging the receipt of letter above referred to, that if they had a claim against
67 the company they were recommended to correspond on the subject with Mr. J. T. Dargan, of Dallas, Texas. A letter was then read from J. T. Dargan, addressed to Bell & Wright, of the tenor following, being dated April first. After acknowledging receipt of their letter of March fourteenth, referred to them by the home office, and stating that no proof of loss had ever been received according to the terms of the policy, and referring to the circumstances of the fire, the letter stated that a strict compliance with the conditions of the policies would be required, and they were requested to forward proofs of loss at the earliest convenience, as it was impossible to do anything in the matter until such were received. The letter stated that notice of the loss had been forwarded to the company as soon as it occurred, but that no proofs of loss had been received.

A letter from Bell & Wright to Dargan & Trezevent, dated April twelfth, was then read, to the following effect: That the letter of April first had been received; that they were not aware Dargan & Trezevent had full charge of the matter, and that their firm name and place of business was unknown until made known in the letter referred to. It had been gathered from Mr. Dargan while he was at Silver City that he was
68 acting as adjuster for the two companies and it had been inferred he was acting directly from the home office; and, referring to the statement that no proof of loss had been received, the letter claimed that Mr. Dargan had had his own way while at Silver City in adjusting the whole matter; had been asked whether anything further was needed; full compliance had been made with all his demands, and it had been supposed that the adjuster while at Silver City had secured all proofs of loss himself, and that until the receipt of the letter referred to Mr. Dargan had been considered as the agent of both parties and not merely as the attorney of one, inasmuch as his expenses, by the terms of the policies, was to be borne by the companies and their clients mutually; that it was well, however, an understanding had been reached so early; that they waived no right of their client on account of anything which had thus far transpired; that George Henderson was then the agent of Mr. Wright, and desired it should be stated explicitly what portion of the requirements had not yet been *required* with, for it was his understanding, as well as the understanding of Bell & Wright, that sworn statements had already been submitted in respect to
69 the loss. The witness went on to state that the sworn state-

ment referred to in the letter read was an affidavit made by Graham at the request of Dargan when the latter was in Silver City. The affidavit had been submitted with full proof of loss at the time when it was supposed Dargan was acting as adjuster directly from the home office, and the witness explained that one reason why he was supposed to be adjuster for the home office was that one of the policies contained a provision that the plaintiff in the case of a loss should bear half the expenses of an adjuster to be sent from the home office. The witness said that the last direction Dargan gave was to furnish the ground plan, to be made by Swain, to Black, and the doing of that was the last action taken by Bell and Wright until the writing of the two letters, as above stated. To the letter last above read witness received a reply, dated April eighteenth, which was read, to the effect following: That it was true Dargan had made such investigations as he saw fit while in Silver City, but that that did not relieve the plaintiff from making the customary proof of loss as required by the policy. The attention of Bell & Wright
70 was called to the requirement of the policy in this respect, and it was asserted that none of the rights of the companies were waived, which required proofs of loss according to the conditions referred to; that the policies would show what proofs were needed; that Mr. Dargan did not act as adjuster or agent for both sides and had never called upon David Wright to bear any portion of his expenses in going to Silver City and returning; that it was true that the policies stated that in case a settlement should be reached the assured should bear one-half of the expenses, but until then the plaintiff was not expected to make any advances on that account; that the sworn statement of Graham was in no sense such a proof of loss as was required by the policies; that Dargan only took Graham's statement as evidence he wished to perpetuate, and that Graham's statement didn't relieve the plaintiff from his duty. The witness then stated that in answer to the letter last read documents were prepared intended to cover the requirements of the policies, which documents were signed by the plaintiff and forwarded by express to Dargan & Trezevant, at Dallas, Texas; of these witness had kept copies.

71 Plaintiff here offered proofs of loss signed and sworn to by David Wright, representing that the building in question was insured on the eleventh of July, 1881, and burned on the nineteenth of January following; that it was built for a hotel, but that from the time it was completed until it was burned it had not at any time been occupied, nor at the time of the burning was it occupied as a hotel. Proofs of loss were accompanied by a certificate of John S. Rilea, magistrate, that Wright had sustained a loss by the destruction of the hotel by fire to the extent of $13,000.

Plaintiff also read the affidavit of Joseph Lusignan, which was in substance that the value of the property at the time of the fire was $12,000.

Witness stated that this affidavit had been forwarded at the same time with the other papers last above referred to. Witness further stated that at the same time was also forwarded an affidavit by John

Graham, which affidavit was read, and was to the effect that Graham was in the employ of the plaintiff to take care of and protect his property, both real and personal, in Silver City, and that on the nineteenth of January, 1882, the hotel property belonging to
72 the said Wright was burned and totally destroyed by fire; that he had two men employed by himself as the agent of Wright, who slept inside and occupied the premises; that these men were occupying the premises at the time and long prior to the time the same burned down, and that affiant was also about the premises nearly all the time, and on the night of the fire was sleeping in the premises adjoining on the north of the hotel; that at the time of the fire he did all he could to save the property and rescue it from the flames; that he didn't know what caused the fire, but was certain it was not caused by or the result of any neglect of duty on the part of any one employed by Wright, the plaintiff; that he did not pretend to be a mechanic, but believed that plaintiff's loss from the fire would not fall short of fifteen thousand dollars; that, inasmuch as he had heretofore given J. T. Dargan a statement of facts under oath pertaining to the matter at the request of Dargan, he did not deem it necessary in the affidavit to state anything further.

Witness further testified that he sent a letter accompanying the proofs of loss and affidavits above referred to, which letter was read by plaintiff, and was, in substance, that the documents trans-
73 mitted were thought to be in strict conformity with the requirements of the policy, and that the whole thing appeared to Bell & Wright as a matter of supererogation in view of their knowledge of the facts, yet they cheerfully acquiesced in the caprices of great corporations; that they stood upon two propositions, namely, the building, meaning the rebuilding, of the hotel, or otherwise the face of the policies, and, in conclusion, the letter referred to Dargan's action at Silver City and to a letter received from the Continental Insurance Company of New York, from both which Bell and Wright inferred a disposition not to meet the issue squarely, and that if such inference were a mistake they were willing to and would apologize.

Witness stated that nothing else was sent to Dargan & Trezevant except a letter, dated June ninth, which was also read, the substance of which is as follows: That Dargan & Trezevant's letter of May twenty-fourth was received and had been carefully considered, and in connection with all the facts enveloping the business, together with their knowledge of what could be proved by reliable witnesses, they felt content to allow the matter to stand as it was, and
74 that they felt if compelled to bring suit it was the duty of Bell and Wright to retain all such matters of evidence as the insurers were fishing for, and they were fully satisfied they had sufficiently complied with the policy.

On cross-examination witness testified that the hotel building was not occupied at any time from the date of its completion until the the time it burned, to his knowledge, as a hotel. His recollection was that a family occupied the eastern wing of the building, and that John Graham slept in and took care of it, and that at one time dur-

ing the summer J. L. Holland occupied one of the rooms; that Holland occupied a room on the second floor, and that when witness went to see him there, in the summer of '81, on several occasions he saw a woman and one or two children there, who seemed also to be residing there, but he did not know by what authority they resided there and did not know positively that they did reside there, nor did he know of his own knowledge that Graham actually resided in the building.

Plaintiff next read the deposition of John M. Ginn, who testified that he was forty-three years old, resided in Silver City, N.
75 M., and that his occupation was a lawyer; that he had practiced law since '66 and lived in Silver City since 1872. He had known the plaintiff three years. Witness testified that he himself had occupied five or six public positions in New Mexico; had been probate judge of the county, United States commissioner, register in bankruptcy, member of the Legislature, and member of the county school board. Witness further testified that a little after the burning of the hotel he was in La Mesilla, at the land office, where he was introduced to a man by the name of Dargan, who approached him on the subject of the burning of the hotel and asked him if he knew anything about the circumstances. This was at Deming. Dargan told witness that he left his valise in the sleeping car; that it had been lost, and that it contained valuable papers connected with the insurance; that he came representing the insurance companies and came from Dallas, Texas; that Dargan requested witness to accompany him to the deputy sheriff to get aid in recovering his lost property, and that Dargan told witness he supposed the company would have to pay the insurance, but he intended to go to Silver City and inquire into it first, and he was consid-
76 erably troubled about the loss of his papers. When witness returned to Silver City he again met Dargan, who informed witness that he had not recovered his papers, but that he could get copies enough to enable him to transact his business; that he was undecided as to whether the company would pay the insurance or rebuild the hotel and place it in as good condition as it was before the fire; that he thought the company could rebuild cheaper than to pay the insurance. Witness testified that Dargan represented himself as the agent of the companies, sent out to Silver City to adjust their liability. Witness further stated that he himself was frequently at the hotel in company with Wright, Roodhouse, and Edwards, or some one or possibly all of them, because he was one of their attorneys and interested in their enterprise, and partly influenced also by curiosity to examine the building; that he was frequently about the premises from the time of the completion of the building down to the fire, and was present when it was destroyed; that the reason he was there was because it was necessary either for himself or Mr. Bell, his partner, to advise the parties erecting the building as to whether or not they had conformed to the
77 plans and specifications in the contract for erecting the building, and to advise them that the buidling should be turned over by sending the keys to the parties for whom it was built.

Witness testified that one room was occupied and possibly more; one was occupied by a colored man, and a man by the name of Graham was also in a portion of the premises; also that a family by the name of Crawford was in one of the rooms for awhile; that Graham and the colored man were both employed by the plaintiff and were employees on the premises; that the building destroyed was built for a hotel by contract between Wright, Roodhouse & Company and Evans & Holt, but never was occupied by Evans & Holt as a hotel for the reason, first, that they would not accept the keys, claiming that the plans and specifications for the building were not carried out; and, secondly, because the firm of Evans & Holt were going to pieces and had no means to furnish the building as a hotel should be furnished. Witness was of opinion that the hotel was built in accordance with the specifications in the contract for the erection of the same. He also testified that John Graham was at the fire endeavoring to save the effects inside the building, and to save the lumber of the windows and doors, window-sashes, and all the
78 effects stored in the room, and that Graham acted as a leader in trying to extinguish the flames. Witness testified that among the things he saw carried out of the burning building was a keg of powder. He said the facilities for extinguishing fire at Silver City were extremely poor, and he thought the fire started in the southeast corner of the building, in the second story. Witness did not know there was keg of powder there before, and whether the keg contained powder or not he knew only from information that came from others; that some gun or pistol cartridges *which* exploded in the fire after the building had nearly burned down. Witness believed the property belonged to David Wright at the time of the fire—such was his recollection—and he believed that John Graham was Wright's agent. Witness thought the value of the building was from ten to twelve thousand dollars.

On cross-examination witness testified that he remembered definitely that Dargan represented himself as the agent of the companies, with authority to inquire into the circumstances of the fire and its cause and to adjust, and that he was undecided as to what the companies would do. Of his own knowledge witness knew noth-
79 ing about where Graham slept, whether in the building or out of it, and all he knew was from general report. He never was in Graham's room, but saw him frequently about the building, and understood he was the agent of the owners and had charge of it. The building was not occupied nor used as a hotel at any time after July, 1881, up to the time of the fire. Witness stated that he used the term owners in his testimony in connection with the building, meaning Benjamin Roodhouse, Shelton Edwards, and David Wright, but to the best of his recollection the property had been transferred to David Wright before it was destroyed by fire, and according to witness' best recollection the deed to Wright was absolute in its terms, and if there were any private motives or secret trusts by which Wright took the property other than as sole owner, such was not disclosed to the witness or to Mr. Bell, his partner; that Shelton Edwards had stated to witness that he had a wife in Georgia. Wit-

ness knew nothing of the value of the building as a lumberman or as a contractor, and all he knew was in connection wi... ...ue drawing of the contract for the building. Witness had built one house himself.

Plaintiff next read the deposition of Charles A. Newton,
80 who testified that his age was thirty-three, and he had resided in Silver City, N. M., since 1880. In the spring of 1882 he was introduced to a man by the name of Dargan, who said he was there in the interest of the companies insuring the Carrolton Hotel, and wanted to ask the witness some questions regarding the fire. Witness declined to state anything until Mr. Williams had assured him that Dargan was the proper person to reply to. Dargan had told witness that he was a person sent by the company to adjust the claims of the policy-holders. Dargan asked witness whether when he first saw the fire he thought it was of incendiary origin, but witness had declined to state so, when Dargan assured witness that if he would help him he would be very much obliged, as he was an adjuster and wanted to get all the information he could. Witness was present at the burning of the hotel and got there soon after the fire was discovered. He saw two persons standing in front of the building. He entered the room below while the fire was burning through the ceiling from the second floor. The hole burnt was about two and a half feet wide by three feet long. Witness went upstairs and tried to reach the room where the fire
81 was confined, but the smoke was so dense he could not get through. Witness came back and went through the house to the back door, burst it open and tried to find an ax, when he saw Graham standing at the gate between what was known as the office and the hotel building, and asked Graham for an ax, and Graham said there was none. He then asked Graham for a bucket and Graham said there was none. Witness testified that if he had had an ax at the time he first went upstairs he could have stopped the fire in a few minutes, as it was at that time. In about half an hour a number of persons gathered around the building and saved such property as could be taken out of the lower story. The fire burned quickly as soon as it had burned through the outside, and when the roof caught fire it was impossible to save it. While the roof was burning and the ceiling of the lower story witness went through the lower part to find anything else that could be saved and found a keg of powder known as black powder, also a coffee-sack containing eight or ten sticks of giant powder. These witness took to the window; the can or keg he rolled out and the sack he threw out. When witness first saw Graham he was standing by the gate referred to, some seventy
82 feet away from the hotel, looking at the smoke as it was coming out of the roof. After witness inquired for the ax Graham said there was no use trying to save the building. Afterwards Graham hustled round and assisted in getting some of the property out. After witness got the powder out he heard a shot and stopped to see where it came from, and in a moment there were fully half a dozen of them, and they were in an upper southwest room.

Witness thought they were cartridges, as the explosions continued for some time. It was customary for people to keep fire-arms on the premises in that country. John Graham had the keys of the building one Sunday a short time previous to the fire, when witness was there, and offered to let him go through the building, so that witness took it for granted that he was in charge of the building, though he did not know.

On cross-examination witness said it was perhaps fifteen minutes after he heard the cry of fire first before he reached the building, and it was ten minutes after he got there before he saw Graham and asked him for the ax and bucket. After witness spoke to Graham, Graham followed witness to the rear of the building, Graham going on to the rear and witness going to the dining-room to
83 break it in. Witness thought the fire could have been extinguished by proper efforts on the part of Graham when witness reached the building, as the fire was then confined to a small space in one room, and had Graham furnished witness with an ax he could very easily have extinguished the fire. The building was in close proximity to occupied residences in all directions. At first when he saw Graham, witness said, Graham was simply looking on, a fact which surprised witness, and after a number of people arrived Graham seemed excited, and ordered the men to save the property. The building had not been occupied for hotel purposes at any time, to witness' knowledge, between its construction and destruction.

On redirect examination witness, when asked how he could have extinguished the fire with an ax, replied that he found the door opposite the stairs to the left locked and found the door on the right also locked, and that if he could have opened that door it would have relieved the smoke from the hallway, and that then he could have gone in and cut around the fire. Witness said that if he could have got the door open in the room next to the room where the
84 fire was he could have got into that room where the fire was. The doors might have been forced with the foot, but witness did not want to incur the smoke unless he was ready to work with an ax.

Plaintiff further read the deposition of Robert Black, who testified that his age was forty-three; business, a builder and contractor, and residence at Silver City, N. M., and had been for eleven years. He had had a good deal of experience in building in Silver City, and had built about three-quarters of all the houses there. Witness had nothing to do with the building of the hotel in question, further than furnishing about half of the building material. Williams had informed witness in the hotel that Dargan wanted to see him, and witness afterward met Dargan on the street in Silver City—about a month after the fire, when they went together to the post office, where Williams was. Williams introduced Dargan as an adjuster of both the insurance companies. Dargan said he came there to adjust the loss, and he wanted to know if witness was a builder and contractor and if he could employ witness to estimate the loss and what it would cost to rebuild the building, stating that if the building could be replaced for the amount of the loss he was in-

85 structed by both companies to adjust it, and if the building could be replaced for the amount of the insurance he was instructed to do so, and even to do so if it cost a little more. Dargan said he proposed to replace it if possible. The building referred to was called the Carrolton Hotel, and Dargan wanted to know of witness if he could get up plans. Witness replied that he hadn't time and preferred that he should get somebody else. Witness said that Mr. Swain, with the assistance of Graham, made plans, which, upon completion, Graham handed to witness, who started upon an estimate, but before it was completed Dargan said he had to leave in the morning, and that witness should hand his estimate on the building, together with the bill for his work, to Mr. Williams. Witness did so. It was understood by witness that Dargan was agent for all parties concerned, but witness knew nothing further about the matter except that neither the companies nor Mr. Dargan had paid his bill. Witness did not recollect exactly the estimate he made, but thought it was ten thousand five hundred dollars, which witness thought was a reasonable estimate and fifteen or twenty per cent. less than the building could have been built for at the time
86 it was originally constructed. Witness thought the buildings in question cost to build between twelve and fourteen thousand dollars. He had never seen the plans and specifications since they were forwarded to the company. At the time of testifying witness was mayor of Silver City. He had had some experience, for about five years, in adjusting insurance losses.

On cross-examination the witness said he never saw the plans and specifications on which the Carrolton Hotel was built, and he did not know whether the plans and specifications furnished by Graham and Swain were the same as the original plans and specifications or not. All he knew was from outside appearance and what Graham said. Witness did not examine the building while in course of construction or after its completion so as to form an approximate estimate of the cost of its construction, but he would undertake to guess the cost within five per cent. of any building in the country. He did not know what the actual market value of the building in July, 1881, was or at the time of the fire, but stated that the question of location had a great deal to do with that of value. He said that the old residents objected to the locality,
87 and the lessees, who were expected to take the property, failed and refused to take it, but witness thought if they had taken it according to contract the hotel was worth the amount he had stated as the cost. Witness did not know exactly the cost of the material used in the construction of the building nor the character and amount of it, but the hotel company paid him about three thousand dollars, and witness knew that material was bought cheap and that Mr. Edwards was a very careful man, basing his purchases upon the best possible prices and getting all the competition among the dealers throughout the county that he possibly could. The finest and best material- used in the construction of the hotel were purchased in Chicago and brought there via San Francisco and Shakespeare. It could not be had in Silver City. The same ma-

terial could be had at a better price or shipped in a much shorter time now than when the hotel was built. It would cost 20 to 50 per cent. less now.

Plaintiff further read the deposition of Thornton Turner, who testified that he was thirty-one years old, resided at Silver City, knew the plaintiff, and commenced working for him in January, 1881, and worked for him the whole of that year. John
88 Graham was in Wright's employ during the same time. Witness was the second person that discovered the fire at the time the hotel burned. He was sleeping in the kitchen of the hotel, down-stairs on the lower floor, and had been sleeping there about a month before that. Mr. Edwards had told the witness he could stay there until they sold the property. Mr. Graham afterwards told witness to go and sleep in the kitchen of the hotel, as he was going to clean the house up. At the time of the fire witness was working for Hardee, up town; had no conversation with the plaintiff about not occupying the premises, any more than that plaintiff told witness they would be back before long and employ him if he was out of employment. Witness had no key to the kitchen of the hotel. A man by the name of Solomon slept there at the same time, and he carried the key to the kitchen. Solomon slept in the dining-room and witness slept in the kitchen. Solomon was the first to give the alarm of fire. He waked up the witness and said the hotel was on fire. Then one could just see a small light shining into the dining-room window. Witness ran over and waked up Graham and told him the hotel was on fire. Witness and this man
89 Solomon got two buckets of water, went into the hallway, and shoved the door and it was open. They went to the top of the stairs, but could get no further for the smoke. No one else had got there then. Witness then went out on the street and gave a general alarm of fire.

On cross-examination witness said he did not know Solomon's first name, and did not know by what authority he was occupying the dining-room. He had been staying there for about a month. The house Graham occupied, belonging to the Carrolton Company, was some distance from the hotel, and was a private building, where they all stayed when in town. By all he meant David Wright, Roodhouse, and Edwards. Wright and Edwards had gone East about two months before the fire.

Plaintiff further read the deposition of George Henderson, who testified that he was thirty-nine years old, and his business was a mining superintendent at Silver City; knew the plaintiff and Graham. Graham had worked for Wright in the mills and Georgetown mines. When the witness returned from New York he was appointed superintendent of the mining property of the Carrolton Mining and Milling Company. At the request of Edwards he
90 gave Graham the use of a spare room in his house, which was the office of the Silver City Mining and Milling Company, formerly the Carrolton Mining and Milling Company. Graham was constantly consulting with witness, Graham acting in the capacity of agent for Mr. Wright. Graham would speak

of letters received from Wright referring to the fire and other general topics. Witness thought it was on March fourteenth he was appointed by Wright as agent, with a general power of attorney, and thereupon the agency of Mr. Graham ceased. Witness knew that Graham was considered agent at Silver City of Wright, Roodhouse and Edwards from the fact that he recommended to these gentlemen the foreman of their mill, and the foreman was not entrusted to pay the hands, while Graham was, who acted in general as their agent. Witness was not in the city at the time of the fire. He had an interview with Mr. Langford, the vice-president of the Continental, at his office in New York, in June, '82, when witness told him that he, witness, was the authorized agent of the plaintiff, and they talked over the matter of the loss, to the best of witness' knowledge, everything being explained, when Langfort finally said that he (witness) had placed the matter in an entirely new light, and that he would write to
91 Dargan and Trezevant, their agents at Dallas, and direct them to proceed to an immediate settlement, and would instruct them to communicate with witness, but witness never heard from them and wrote Langfort, inquiring why he had not done as agreed, but received no reply. The president of the Continental Insurance Company was then in Europe. In the conversation Langfort said he had understood that the setting on fire of the hotel was the work of Mr. Wright or his agent, and that it was burned for the insurance, but witness told him that, knowing Wright as he did, he believed him entirely incapable of doing or countenancing such a thing, and that it would be an easy matter for him to send to Wright's home and find out his standing and character at his home in Illinois. Witness also told Langfort that, while Wright was unfortunate in his connection with Edwards, who had become unpopular in Silver City and who, he had no doubt, had got Wright and Roodhouse to be reckoned in the same way, witness was sure there was no merchant in Silver City who would testify that Mr. Wright was capable of the action of which he was suspected. Witness explained to Langfort his theory of the fire as follows:
92 That the firm had become unpopular, as witness had learned through Mr. Edwards, and some one, through spite, had set fire to the hotel. Witness explained the combustible nature of the fuel in use at Silver City, and further told Langfort that he was authorized by Wright and Edwards to pay a thousand dollars for the apprehension and conviction of the incendiary. This was about all witness had told Langfort. Witness was authorized by Wright & Edwards to pay the sum of one thousand dollars for the apprehension and conviction of the incendiary and he had always tried to find out the person. The property rescued from the fire was worth less than a thousand dollars. At the time of the fire Edwards and Roodhouse were in New York and Wright was in Carrollton, Illinois, as witness believed. At the time of the fire Edwards was organizing a stock company or something of that sort in New York city to furnish and run the hotel.

On cross-examination witness stated that Edwards authorized him

to offer the reward of a thousand dollars for the apprehension of the incendiary, in New York, the same day or the next after the fire, and directed witness, as he was starting back to Silver City, to learn the origin of the fire, at the same time authorizing the
93 witness verbally to offer a thousand dollars to find the person, and that afterwards, when told what Edwards had offered, Wright said he would stand by the offer.

Plaintiff further read the deposition of Nathaniel Bell, who testified that his age was thirty-six. He was a miner, and lived in Pinus Altun, Grant county, N. M. He had been a dealer of lumber for four years, eleven miles west of Silver City. He knew the Carrolton Hotel property that was burned down, and had furnished lumber for the hotel building to the extent of about thirty-five or forty thousand feet. Witness thought he got between nine hundred and a thousand dollars for the lumber. Mr. Hartford furnished the timber. Their value the witness did not know. Witness was through the building during its construction, but was not there after it was finished. He would judge the building cost between thirteen and fifteen thousand dollars. He did not know the actual cash or market value of the building at the time of the fire, as he did not keep posted on the increase or decrease of value. The value of the ground he did not consider in his estimate of the cost of the building.

Plaintiff further read deeds from Benjamin Roodhouse and wife and Shelton Edwards and wife to David Wright of the property in question, the material portions of which were as follows:
94 Both deeds recited a consideration of seven thousand dollars in hand paid by David Wright, and remised, released, and forever quitclaimed to plaintiff, his heirs and assigns, forever, all title, interest, and estate, legal and equitable, in and to the following premises, with all the appurtenances and hereditaments thereunto belonging, situate, bounded, and described as follows, to wit: Lots number one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, and sixteen, in block number fifty-nine, as authenticated by the Kidder survey, and block number one hundred and forty-four, as designated by the new survey of John R. Frazer, located in the town of Silver City, Grant county, and Territory of New Mexico.

The date of the deed from Roodhouse and wife was May 31, 1881, the date of the acknowledgement of the signature of Roodhouse being July second, and that of his wife May thirty-first, 1881.

The date of the deed from Edwards and his wife was May 31st, 1881, and the date of the acknowledgement of the signature of Edwards being July 2nd, and that of his wife May thirty-first, 1881.

The signature of Mrs. Roodhouse was acknowledged before Leander R. Lakin, county clerk of Greene county, and that of Mrs. Edwards before Seth F. Hanchett, clerk of the probate court of
95 Cook county, Illinois, while the signatures of Roodhouse and Edwards themselves were acknowledged before James Corbin, a notary public of Grant county, New Mexico.

Defendants thereupon in open court conceded that the title of the

property insured and the real estate described in the deeds of Edwards and Roodhouse to Wright was in Wright, Roodhouse, and Edwards at the date of those deeds.

At this point plaintiff closed his testimony, whereupon the defendant, to establish the issues on his part, introduced and examined certain witnesses, who, having been first duly sworn, testified as follows:

Defendant's Side.

Defendant first introduced Ichabod M. West, who testified that he was acquainted with David Wright and Mr. Dargan; had known Wright since the latter part of 1880, at Silver City, N. M. Witness lived in Silver City from October, '80, till August 17th, 1881. He knew all the members of the firm of Wright, Roodhouse & Company and had business relations with all of them, more or less, having worked for the company in charge of the construction of their quartz mill, and he was with them in the house a great deal. They had their office at first in the Johnson building, which was afterwards a part of the Carrolton Hotel, after which their office was in the Frazier building. They had another office down near the
96 Carrolton Hotel, built about the time the hotel was being built. Witness made the plans and specifications for the Carrolton Hotel at the instance of Shelton Edwards and talked them all over with Wright and Roodhouse in the back room. The hotel was built for Wright, Roodhouse & Company. Witness was an engineer and followed general construction; understood making drawing plans, specifications, and estimates. He commenced the drawings for the Carrolton Hotel in March, '81. They decided to build the hotel in March. They acquired the ground from one J. R. Johnson in November, '80. The hotel occupied a part of the block, but didn't cover half of the ground purchased from Johnson. Witness understood from Wright, Roodhouse and Edwards that they paid near three thousand for the house and block. The house then on the ground was adobe and formed afterwards a part of the hotel. Adobe meant made of brick sun-dried, about four inches thick and twelve inches long. The plan included the adobe building which was then there, to which was built an addition on the ground floor, and on top of all was put another story, making the complete hotel. The new part was stuccoed—that is, lathed and plastered inside and out. The lumber used in the building consisted of studding, flooring, and rafters, but there were no weather-boards and ceiling. Witness' original
97 estimate of cost was sixty-one hundred dollars. He thought the building cost something more than the original estimate, for other work was put on to the extent of a thousand or twelve hundred dollars. Witness heard Wright say the building cost him more than the estimate, but Wright did not say how much more. The contract price for the lumber in the mill-house was twent-four dollars and seventy-five cents a thousand, delivered on the grounds. It took between twenty-five and twenty-six thousand feet of rough lumber for the hotel, not speak-

ing of finishing lumber. Other lumber was used to the extent of thirty-five thousand feet. Flooring cost thirty-five dollars a thousand. Witness thought the whole property on the first of July, 1881, was worth nine thousand dollars and the hotel building was worth from eight to nine thousand without the improvements that had been put there, including some walls put up on the outside with a stone fence around. Witness had lived in the West about thirty years and was familiar with the building materials and buildings in that country. The hotel in question was being built for use as a hotel for Holt and Evans, under a contract to take it from Wright, Roodhouse and Edwards when finished. They were to take the whole hotel property. When the hotel was finished witness carried the keys
98 to Holt and Evans, at the request of Shelton Edwards, about the last of June or the first of July, 1881. Witnes did not think the property had been insured at that time, but it was then completed. He understood that it was insured after the first of July, 1881. He had heard Wright speak of it. Holt and Evans refused the keys and witness returned them to Wright. At the time witness tendered the keys Holt said he didn't want them, as the hotel was not what he contracted for, and witness reported the reply to Wright. Witness did not think Wright made any reply when informed what Holt had said, but took the keys. Witness heard a conversation between Wright, Roodhouse and Edwards about transferring the title of the property to Wright; the conversation was in the east room of the adobe building and concerned the trouble they had about the property which they had transferred to the Carrolton Milling and Mining Company, and about Mr. Edwards having a difficulty in getting his wife to sign the deed so as to get it back in time, and they thought it would be better to transfer the legal title to Mr. Wright, as he had no wife, and then if transferred at any time the transfer could be made without waiting for the signatures of Mrs. Roodhouse or Mrs. Edwards. Witness heard them speaking about this at different times and
99 as late as April, '81, at which time the hotel was still being built, and an arrangement had been made to transfer it to Holt and Evans when completed. The hotel proper covered about eighty-odd feet in length by forty-two in width, which was only a small portion of the block. Mrs. Roodhouse and Mrs. Edwards were not at Silver City at that time. Witness heard a conversation between Wright and Edwards in front of the Carrolton House, when they were speaking of the hotel not being taken, when Edwards said if Tom Holt didn't take the hotel according to agreement and pay for it the insurance companies would, and Wright in reply said, You shouldn't talk that way; it will get us into trouble if the building is burned; very indiscreet to talk that way. This was in July, about the time the keys were refused by Holt, and they were talking about that fact. Witness did not work for Roodhouse and Wright after the first of June, but did for Edwards. He did not know whose agent Graham was. Graham was working for Wright, Roodhouse, and Edwards on the 1st of January, '81, as far as witness knew. Witness put in some pipe at the hotel, at the direction of Edwards,

about the middle of June. There were no stuccoed walls in the building. Stucco is made of lime, plaster, and marble dust.
100 The specifications called for such work, which was put on of lime and sand and rubbed down. The studding, roof, floors, and joist were wood, and outside and inside lathed; inside plastered and finished up and outside plastered and rubbed down.

On cross-examination the witness said he went to work for Shelton Edwards about June, '81, when he was employed about the mine. Wright and Roodhouse were there frequently, but witness was not working for them. Wright was around frequently; Roodhouse was not there so much. Wright left to go back to Carrollton about July. Witness remained in Silver City until the seventeenth of August, and then went to San Francisco; then to San José, Gautemala. Witness got back to San Francisco about the tenth of February, '82; remained there five days, and then went to Portland, Oregon; thence to Lake Pendril, Idaho; thence to Deer Lodge, Montana; thence to Phillipsburg, Montana; thence to Butte City, where stayed about ten days. He next went to Bidford Cañon, Idaho, and stayed there about two months. He then went to Lehigh Junction, and was there until the fourth of August, '82. He then went to Salt Lake, and from there to Ogden. He then went to Denver; got there about August, '82, and remained five days. He then went to Ruble, where he stayed twelve days, and thence to Deming, N. M., and from there to Silver
101 City, where he arrived in September. There he stayed four or five days, then went back to Deming, and from there to Albuquerqe, where he staid until the last days of September. From there he went to Nut Station, on the Topeka and Santa Fé road, and was there until in December, when he went to El Paso, Texas. From there he went to Fiesta, and from there to Texarkana, where he remained four weeks. He then went to Longview, Texas, and from there to Jefferson; thence to Austin and back to Jefferson; thence he returned to Austin and went to San Antonio; was in San Antonio about a month. He then went back to Austin. This was in the last of April, '83. He then went back to San Antonio, and stayed there till June, '83. He then went to Washington city for six days and returned to Austin, from whence he went to Dallas, where he had remained most of the time since. The first work of witness in Dallas was to put machinery in the elevator. He was at Waxawatchie twelve days, and then returned to Dallas. His family never lived in Dallas. Witness had been at Fort Worth some time and at Dallas ever since, except in going back and forth; had been in the construction of the new Windsor Hotel after the middle of February. His family was in Boulder City and, he thought, had been there all the time. Witness went to Silver City about the
102 last of October from Tombstone, Arizona, where he had been about a month, and to which place he went from San Francisco. In San Francisco he had been about two weeks. He went from Portland to San Francisco; that was in '80; went from San Francisco to Portland. Went to San Francisco from Ogden at that time, to which place he had come from Denver, and to Denver he had come from Boulder City. He came from New York city to

Boulder City; had been in New York a few days—not so long as a week; was in the Black Hills from 1875 to July, '80—not all the time, but was in and out. He was mining and mill-building; knew Shelton Edwards at the Black Hills. The first he knew of him was in the winter of '77 and '78, when he was not mining but keeping a saloon at a place called Central. Before going to the Black Hills in '75 witness lived in Boulder City, to which place he went in '73 or '4 from Kansas City, Missouri, to Denver, and from Denver to Boulder City. Witness didn't know that he could fix the date when he last saw Wright in Silver City, but thought it was in the month of July. Witness did not know that Shelton Edwards held a power of attorney from Wright. Edwards died in New York March fifteenth, '82, as witness recollected. Witness was first in the employ of
103 Edwards June first, '81; was not employed by him at any time after he left; was then employed for Edwards about a month or more. Witness thought Edwards had property; the first time he saw him he talked to witness about directing a quartz mill. He had an interest in a quartz mill in Silver City, but did not know that he ever got a nickel out of it. He made some money out of the sale of a portion of a silver mine a mile from Silver City. In relation to the hotel, the lots were eighty-odd feet long and between forty and forty-two feet wide in the widest part. Kitchen and dining-room were built separate, four or five feet from the main building, connected by a gallery above. Witness did not draw the plan for the kitchen. The shingles for the building cost about two thousand dollars; they were all received through Meredith & Aleman. Witness could not state how many rooms there were in all exactly, but as nearly as his recollection went, there were thirty-nine.

On redirect examination witness said that during his journeyings as described he was part of the time working at building and part of the time doing nothing. Witness understood that Edwards
104 was a partner in the business with Roodhouse & Wright at Silver City, and was such at the time the building of the hotel was begun, as he understood. Witness made the estimates at the instance of Mr. Edwards. He knew that Edwards out there always had money. He knew he had a silver brick made of silver which he got from some private individual and was worth nearly three thousand dollars.

On cross-examination witness said the brick came out of the mill, but he did not think it came out of any mine.

This witness, being recalled the next morning, said that the building which contained the dining hall constituted between twenty-five and thirty per cent. of his whole estimate, while the main building constituted from seventy to seventy-five per cent. Witness during all his travels had supported his wife and family. He had a boy at Dallas who was between eighteen and nineteen years old.

On recross-examination witness said he had not seen his wife since 1880. The number of his children was not less than eight, married and all. The doors and sash used in the hotel building were made in Chicago; could not tell what they cost.

The next witness called by defendant was J. T. Dargan,

105 who testified that his residence was Dallas, Texas, and business that of an insurance agent, representing five companies in the Southwest, among which were the Continental of New York and the Fire Association of Philadelphia. He had been in the business between twelve and fifteen years, and had been at Dallas, he thought, pretty near twelve years. He had been in the business of fire insurance exclusively. The first he knew about the property in controversy was by the daily report of the sub-agent at Las Vegas, N. M., T. B. Mills, giving an account in the order of business. That report was accompanied with an application, which witness had since lost, together with his valise and other papers, when on his way to Silver City. Witness had made every effort he could to recover the valise and papers—had offered a reward and spent two days in search, but without success. Witness said he remembered the points in the application, that he thought important, pertaining to the loss, as he had compared the application with the policies, and shortly after the loss had recalled and made a memorandum of what he could remember. Question 10 in the application, which inquired, Are the premises entirely under the control of occupant, and for what purpose? If not, give full particulars
106 as to its occupancy and control—witness stated was answered as follows: To be occupied within sixty days as a hotel by tenant. The value of the property as set forth there was ten thousand on one building and five on the other, the total value being stated at fifteen thousand dollars. To the question whether there was any other insurance witness said the application answered, none; and as to the title the answer was, fee simple, without any explanation. The name signed to the paper was David Wright, and the date was July 1st, '81. On the back of the application was a statement in writing as follows: Party leaves in a few days for the East to buy furniture and fit up the hotel in business style.—David Wright. Party was not named. To a question, Suppose the application had said the building was to be vacant? witness said risk would not have been taken. At Silver City witness hunted up the deputy postmaster, whom he had known before at Dallas, and of Bell & Wright he inquired value of building and circumstances of loss, interviews there being almost entirely with Bell. Mr. Williams, he thought, introduced him to the firm who were acting for plaintiff. Witness went to see policies deposited in a safe, and apparently not under control of Bell and Wright, but of Graham—at least,
107 Bell and Wright did not appear to have them in their possession, though they might have had access to them. Witness told Bell & Wright that he came to investigate, and, if possible, to adjust the loss, but that he never told them that he came merely as an adjuster for both parties. He was introduced as a general agent, Mr. by Williams, of the insurance companies, and to the best of his recollection his power was never discussed. The first man he met representing Wright was Graham, with whom he conversed about the loss, and had frequent interviews while there. Witness took Graham's affidavit. As to whether witness first spoke to Black or to Bell and Wright he did not know, but he let them

know he wanted the data connected with the construction of the building, so as to arrive at the value of it, and in that view he wanted the plans and specifications; but he never asked anybody for the ground plan, as he saw that for himself when he went and examined the location. Bell and Wright said there were plans and specifications on file with Aleman, and witness, introduced by Mr. Bell, he thought, went over and asked to see them. The plans and specifications were shown him, but he was not allowed to take them away, and after he had been allowed to look at them a
108 few minutes they were rolled up and put back in the vault, Meredith or Aleman claiming them as their property and saying that they had some trouble with the hotel firm, and therefore could not risk letting the papers go. The policies, being exhibited to witness, were *represented* recognized as the papers he saw in Silver City, where witness pointed out to representative of Mr. Wright the clause as to furnishing proofs of loss and plans and specifications. Witness had asked Williams who would be a good builder in town. Bell said that West & Lusigman were both absent, and witness was introduced to a man named Black, running a planing-mill, who said he had furnished some of the material for the hotel building, and witness told Black, after he got the plans and specifications, he would call on him for an estimate upon them. Black voluntarily told witness that the hotel building was worth five thousand dollars and not over that. Witness told Bell and Wright distinctly that he denied liability on account of the loss. Witness never received either plans and specifications or proofs of loss, but did get what purported to be a bid from Black, which was contained in about three lines. As to Mr. Ginn, whose deposition was read by the plaintiff, he was introduced by the sheriff at Deming to a man, and when he got to Silver City he had
109 mentioned it, but hadn't thought of it since. He could not have told Mr. Ginn that he intended to pay the loss before investigation. Witness denied having said to anybody in Silver City, after learning the circumstances of the loss, anything whatever that waived the rights of the companies. When witness visited Silver City he had to use stage from Deming fifty or sixty miles. He admitted the correspondence, which had been read, between himself and the firm of Bell and Wright, but said he had received no instructions to settle the loss.

On cross-examination witness claimed to have produced the exact language of the application as near as he could, and that he had done it not entirely from memory, but partly from a memorandum made at the request of Phillips & Stuart, counsel for the companies, shortly after the loss occurred. The copy from which witness testified in court had been prepared within thirty days, and the witness finally admitted even within six days previous, at the Southern Hotel, in St. Louis.

Defendant next called Oscar W. Williams, who testified that he was now living at Fort Stockton, Texas, but in '81 and '2 he had lived in Silver City, N. M. He had been educated as a lawyer, and went from Carthage, Hancock county, Illinois, to Dallas, Texas, first,

110 and thence to Silver City, N. M., in 1880. In 1881 he was deputy postmaster at Silver City, and continued to be so for about two years. He knew of the Carrolton Hotel, and also of the firm who built it—a firm which he judged, from the remarks of the members, was composed of David Wright, Benjamin Roodhouse, and Shelton Edwards. He got acquainted with those persons in the spring of '81. They had a mine and mill at Silver City and built two buildings there, near each other—one the Carrolton Hotel and the other called the Dorsey place, he believed. They were engaged in litigation, but, so far as witness knew, not in the spring of '81, and all the witness knew as to that was that he had issued an attachment in January, '82, as deputy in the office of the United States clerk there. Witness would suppose the Carrolton Hotel was completed in June or July, '81, and he saw it at least every two days and knew that it was not occupied, opened to the public, or furnished as a hotel at any time whatever. After the building was finished witness knew that Edwards gave directions to Graham in respect to it. Witness had met Mr. Dargan in Dallas, Texas, some time in '79, and saw him in Silver City about a month after the fire, when he took him up to see Bell and Wright; could not recall what was said.

111 Witness also introduced Dargan to Black, but Dargan did not employ Black in his presence to do anything, though some reference, which he didn't remember, was made to plans and specifications, but which witness thought was to the effect that it would be difficult to get plans and specifications, because they were in the hands of persons who did not want to give them up, and besides the building was built a little differently from the plan. Mr. Black, as witness remembered, was to deliver to witness an estimate based upon whatever plans and specifications he could get upon the building, but Mr. Black never handed witness an estimate, though he did hand him a bid, which was in writing, and which the witness handed back to Mr. Black afterwards, though not till he had forwarded it to Mr. Dargan, who returned it, saying that what he wanted was not a bid, but a detailed estimate of the cost. Graham had signed a statement already prepared and attached to it his affidavit before the witness as deputy clerk. Mr. Dargan had told Graham that he wanted the paper for future use. Witness did not think Dargan used the term adjust much, because that was a term new to him at the time, and witness thought he would have remembered it. Dargan came from Deming to Silver City, 55
112 miles by stage. There was no railroad to Silver City then. The railroad was built there in January, 1883, or March, 1883.

Here defendant read the deposition of T. B. Mills, with the exception of the last answer to the last question, which was withdrawn.

Mr. Mills testified that he was forty-three years; his occupation real estate and bond broker, and his residence Las Vegas, N. M. Witness knew the Continental Fire Insurance Company and the Fire Association of Philadelphia, as he had been their agent for two years, and he knew David Wright through his application for in-

surance. In July and August, '81, he lived in Las Vegas, and was engaged in the insurance and real estate business, and in July of that year he received an application from David Wright, through T. Park Butcher, on a hotel in Silver City, the value of which, as set forth in the application, was fifteen thousand dollars, and he asked for ten thousand insurance. The application was fully and clearly filled out and signed by David Wright. It was written upon a blank of the Fire Association of Philadelphia. It stated that the property was unencumbered in every way, and was to be occupied as a hotel within sixty days, and also

113 that at the time the application was made the party was just leaving for the North to buy furniture to fit up the hotel; that it was very valuable and paying property, and that there was no fear of incendiarism. Upon this application witness issued two policies of five thousand dollars each—one in the Fire Association of Philadelphia and one in the Continental Fire Insurance Company of New York. The application was made a part of each policy. The application was signed by David Wright and forwarded by witness to Dargan & Trezevant, State agents for the companies named, at Dallas, Texas, together with the monthly report of the witness respecting the two policies in question. Witness stated that David Wright in his application claimed to be the owner of the property.

The defendant also called David Wright, who identified the deeds heretofore referred to in this record by Shelton Edwards and Benjamin Roodhouse to himself, but was unable to testify as to the handwriting of the signatures. Witness was in Silver City on the second day of July, '81, but had no personal knowledge as to the writer of the deeds, though he thought they were written by Edwards.

At this point defendant rested.

Plaintiff in rebuttal went upon the stand and testified as follows:

DAVID WRIGHT recalled:

114 Plaintiff testified that on the first of May he contracted with Roodhouse and Edwards for the property—first of May, '81. He made application for insurance in the Continental Insurance Company of New York and the Fire Association of Philadelphia, the same companies whose policies were being sued on. The best of witness' recollection that the entire cost of the building in question was fourteen thousand dollars—of both buildings—and witness further testified that an ell kitchen was put on afterwards by himself, which cost about thirteen hundred dollars. Plaintiff further testified that at the time of the issue of the policies to him the buildings were worth the amount stated in the application. Plaintiff denied any such conversation with Edwards as that detailed by the witness West, to the effect that if Holt & Evans did not take the property the insurance companies would. The plaintiff also testified that he gave Edwards a power of attorney to look after the property after plaintiff had contracted for it and during plaintiff's absence. "I did not know any powder or other com-

bustible material was kept in the hotel, and never gave any one permission to keep it there. I am the sole owner of the
115 entire hotel property and grounds; never parted with it since I bought out Roodhouse and Edwards, in May, 1881. The sash, doors, windows, and finishing lumber for the hotel were bought in Chicago, Ill., and had to be shipped from there to San Francisco, and from San Francisco to Shakespeare, and hauled from Shakespeare sixty miles by wagon to Silver City, N. M. Shakespeare was the nearest point to be reached by rail. Flooring and dressed lumber were dear in Silver City all that time, because it had to be shipped from the East in that round-about way. The furniture and supplies for furnishing the hotel could not be bought in Silver City. Such things had to be bought in the East and shipped round by San Francisco and Shakespeare. It would take all of six months to get the furniture to the hotel. Holt & Evans never gave up their contract and refused to occupy it until the latter part of July, 1881. It was hard to lease it then."

At this point plaintiff rested, the testimony was announced finished, and the case closed.

The court adjourned to nine o'clock a. m. on Monday.

On the reconvening of the court the plaintiff proposed to go upon the stand again to testify with regard to the form of the application, whereupon defendant objected. The court overruled the objection; to which action of the court defendant then and there excepted.

116 Plaintiff then testified in substance as follows:

DAVID WRIGHT recalled:

Plaintiff said that to the best of his recollection the application in question contained no statement at all with reference to the occupancy of the hotel, only that it was to be used as a hotel. To the best of witness' recollection the statement in that respect in the application read as it reads in the policy. It did not state anything as to occupancy, but only that it was to be used as a hotel.

On cross-examination witness had no recollection of language in the application to the effect that the building was to be used as a hotel within sixty days, and to the best of his memory he would say that it was not true that it did so state.

On redirect plaintiff stated he had first made known the fact of his recollection about the application since the adjournment of the court on Saturday, and between four and five o'clock on Monday morning, at the train.

Here the plaintiff rested and both sides announced the case to be closed, and the foregoing is a true statement of all the testimony offered in the case.

After argument and before the case was given to the jury the court was asked by the defendant to give the following instruc-
117 tions to the jury: That, in view of the provision of the policy that the building was to be occupied as a hotel, the law im-

plies the contract to be that it should be occupied within a reasonable time thereafter, and the fact, sworn to by the plaintiff, that between the 11th day of July, the date of the policy, and the 19th day of January, the date of the burning, the building had not been and was not at the time of the burning occupied as a hotel, constituted such a delay in the time of occupancy as was unreasonable and such as in law avoids the policy, and the verdict of the jury upon that ground should be for the defendant. This instruction the court refused to give; to which refusal the defendant then and there excepted.

The court thereupon instructed the jury as follows:

The COURT: Perhaps the most important point in this case is the use of the building as a hotel. The policy provides that the application of the plaintiff for insurance shall be considered a part of the policy. The application has been lost and cannot be produced. The defendant, the insurance company, contends that the application provided that the building should be occupied as a hotel in sixty days. The plaintiff insists that there was no such
118 limit. The jury are to decide from the evidence that has been heard on the subject what the provisions in the application are. If you should come to the conclusion, from all the evidence applicable to the subject, that it contained a provision that the building should be used for a hotel within sixty days, then the plaintiff would not be entitled to recover, because when the building was burned it was not operated as a hotel.

This is all I am inclined to say on that subject.

There is a question made about the title of the property. The evidence shows the legal title was in the plaintiff, from the other gentlemen, owners with him. That is enough, unless you believe from the evidence that he holds that title for the benefit of Roodhouse and Edwards. If he does, then he would not be entitled to recover, for the policy provides that he must be full and absolute owner of the property in order to recover the insurance.

As to reasonable time I will say to the jury that if there was no statement in the application as to the time in which the building was to be used as a hotel, in that case it was the duty of the plaintiff to operate it as a hotel or have it used as a hotel in a reasonable time, and the question of reasonable time is for you to determine.

I believe there is a provision in the policy that no powder
119 or combustible material be placed in the building while insured. If the jury should believe from the evidence that the plaintiff Wright, or his authorized agent, authorized powder or other combustible material to be placed in the building that would vitiate the policy and render it void.

And the defendant insisted that the court should instruct the jury, as a matter of law, that upon the facts of the case the verdict should be for the defendant; and to the giving of the instructions given by the court and to the refusal of the court to instruct the jury as the defendant requested the defendant then and there excepted.

And, inasmuch as the matters and things aforesaid do not appear of record, the defendant tenders this its bill of exceptions, which it